

1 LIONEL SAWYER & COLLINS
2 SAMUEL S. LIONEL (SBN 1766)
3 slionel@lionelsawyer.com
4 CHARLES H. McCREA, JR. (SBN 104)
5 cmccrea@lionelsawyer.com
6 STEVEN C. ANDERSON (SBN 11901)
7 sanderson@lionelsawyer.com
8 1700 Bank of America Plaza
9 300 South Fourth Street
10 Las Vegas, Nevada 89101
11 Telephone: 702.383.8888
12 Facsimile: 702.383.8845

13 MORGAN, LEWIS & BOCKIUS LLP
14 MARC J. SONNENFELD*
15 msonnenfeld@morganlewis.com
16 1701 Market Street
17 Philadelphia, Pennsylvania 19103
18 Telephone: 215.963.5000
19 Facsimile: 215.963.5001

20 JOSEPH E. FLOREN*
21 jfloren@morganlewis.com
22 BENJAMIN P. SMITH*
23 bpsmith@morganlewis.com
24 CHRISTOPHER J. BANKS*
25 cbanks@morganlewis.com
26 One Market, Spear Street Tower
27 San Francisco, California 94105-1126
28 Telephone: 415.442.1000
Facsimile: 415.442.1001

17 Attorneys for Plaintiff,
18 KAZUO OKADA
19 *pro hac vice application forthcoming

20 UNITED STATES DISTRICT COURT

21
22 DISTRICT OF NEVADA

23 KAZUO OKADA, an individual,

24 Case No. 13-cv-00136-JCM-PAL

25 Plaintiff,

26 v.
27
28 **PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

WYNN RESORTS, LIMITED, a Nevada
corporation,

Defendant.

TABLE OF CONTENTS

2		Page
3	MOTION FOR PRELIMINARY INJUNCTION	1
4	MEMORANDUM OF POINTS AND AUTHORITIES	1
5	I. INTRODUCTION	1
6	II. STATEMENT OF FACTS	3
7	III. ARGUMENT	6
8	A. Mr. Okada Is Likely to Succeed on the Merits of His Complaint Against Wynn Resorts for Disseminating False and Misleading Proxy Materials in Violation of Section 14(a) of the 1934 Act	6
9	1. The Biased and Admittedly Non-Independent Freeh Sporkin Report	8
10	2. The Company Code of Conduct and FCPA Training	10
11	3. The “Imperative” Need to Remove Mr. Okada	11
12	4. Mr. Okada’s Investments in the Philippines	13
13	5. Steve Wynn’s Activities in Macau	15
14	B. Mr. Okada Will Suffer Irreparable Harm Absent a Preliminary Injunction to Halt the Special Meeting in Which Wynn Seeks to Remove Mr. Okada from Its Board of Directors	18
15	C. The Balance of Equities Weighs in Mr. Okada’s Favor	19
16	D. A Preliminary Injunction Is in the Public’s Interest	20
17	IV. CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)	
2	CASES
4	<i>Berkman v. Rust Craft Greeting Cards, Inc.</i> , 454 F. Supp. 787. (S.D.N.Y. 1978)..... 18
5	
6	<i>Blasius Indus. v. Atlas Corp.</i> , 564 A.2d 651 (Del. Ch. 1988)..... 20
7	
8	<i>Flynt Distrib. Co. v. Harvey</i> , 734 F.2d 1389 (9th Cir. 1984)..... 6
9	
10	<i>Gitlitz v. Bellock</i> , 171 P.3d 1274 (Colo. Ct. App. 2007)
11	19
12	<i>In re Netsmart Techs., Inc. S'holders Litig.</i> , 924 A.2d 171 (Del. Ch. 2007)..... 7
13	
14	<i>In re Oracle Corp. Derivative Litig.</i> , 824 A.2d 917 (Del. Ch. 2003)..... 9
15	
16	<i>Johnson v. Couturier</i> , 572 F.3d 1067 (9th Cir. 2009)..... 6
17	
18	<i>Krauth v. Executive Telecard, Ltd.</i> , 890 F.Supp. 269 (S.D.N.Y.1995)..... 20
19	
20	<i>Lone Star Steakhouse & Saloon, Inc. v. Adams</i> , 148 F. Supp. 2d 1141 (D. Kan. 2001)
21	20
22	<i>Miller v. Thane Int'l, Inc.</i> , 519 F.3d 879 (9th Cir. 2008)..... 7
23	
24	<i>ODS Techs., L.P. v. Marshall</i> , 832 A.2d 1254 (Del. Ch. 2003)..... 7, 18
25	
26	<i>Palumbo v. Deposit Bank</i> , 758 F.2d 113 (3d Cir. 1985)..... 19
27	
28	<i>Seinfeld v. Gray</i> , 404 F.3d 645 (2d Cir. 2005)..... 7
29	
30	<i>Shaev v. Saper</i> , 320 F.3d 373 (3d Cir. 2003)..... 7, 8
31	
32	<i>Shoen v. AMERCO</i> , 885 F. Supp. 1332 (D. Nev. 1994)
33	7, 20, 21

TABLE OF AUTHORITIES (continued)

Page(s)	
2	<i>St. Louis Police Ret. Sys. v. Severson</i> , No. 12-CV-5086, 2012 U.S. Dist. LEXIS 152392 (N.D. Cal. Oct. 23, 2012)..... 7, 18, 19
3	
4	<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109 (9th Cir. 2009)..... 6
5	
6	<i>Street v. Vitta</i> , 685 F. Supp. 379 (S.D.N.Y. 1988)..... 19
7	
8	<i>TSC Indus. v. Northway, Inc.</i> , 426 U.S. 438 (1976)..... 7
9	
10	<i>United Paperworkers Int'l Union v. Int'l Paper Co.</i> , 985 F.2d 1190 (2d Cir. 1993)..... 8
11	
12	<i>Virginia Bankshares, Inc. v. Sandberg</i> , 501 U.S. 1083 (1991)..... 18
13	
14	<i>Winnemucca Indian Colony v. United States ex rel. Dep't of Interior</i> , 837 F. Supp. 2d 1184 (D. Nev. 2011)..... 6
15	
16	<i>Winter v. Natural Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008)..... 6
17	
18	<i>Wisdom Import Sales Co. v. Labatt Brewing Co.</i> , 339 F.3d 101 (2d Cir. 2003)..... 18, 19
19	
20	STATUTES AND REGULATIONS
21	Nev. Rev. Stat. § 78.335 5
22	Sec. Exch. Act of 1934 § 14(a) 1, 2, 6, 7, 8, 18, 19
23	SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 1, 2, 6
24	OTHER AUTHORITIES
25	<i>Kate O' Keefe, In Wynn's Macau Deal, a Web of Political Ties</i> , THE WALL STREET JOURNAL (July 1, 2012), available at http://online.wsj.com/article/SB10001424052702304782404577488692803611700.html 16
26	SEC Release No. 34-15230, 1978 WL 186739 (Oct. 13, 1978)..... 7

MOTION FOR PRELIMINARY INJUNCTION

2 Plaintiff Kazuo Okada (“Mr. Okada”), a co-founder and member of the Board of Directors
3 of Defendant Wynn Resorts, Ltd. (“Wynn Resorts” or the “Company”), hereby moves the Court
4 for a preliminary injunction to enjoin Wynn Resorts from holding the Special Meeting of
5 shareholders that Wynn Resorts has called for February 22, 2013 for the sole purpose of asking
6 the shareholders to vote to remove Mr. Okada as a director of Wynn Resorts (the “Removal
7 Proposal”). Wynn Resorts called the Special Meeting by a Notice and Proxy Statement that it
8 filed with the U.S. Securities and Exchange Commission (“SEC”) on January 3, 2013 (the
9 “January 3 Proxy” or “Proxy”), which contains numerous materially false and misleading
10 statements concerning the purported reasons why shareholders should vote in favor of the
11 Removal Proposal, in violation of Section 14(a) of the Securities Exchange Act of 1934, as
12 amended (the “1934 Act”), and SEC Rule 14a-9 promulgated thereunder. A preliminary
13 injunction is necessary and warranted to prevent the irreparable harm that otherwise will result
14 from Wynn Resorts’ violations of federal securities laws if Wynn Resorts’ shareholders vote on
15 the Company’s Removal Proposal based on the biased, incomplete, and materially false and
16 misleading statements in the Company’s Proxy.

17 This Motion for Preliminary Injunction is based on this Motion, the following
18 Memorandum of Points and Authorities, the Declarations of Kazuo Okada (“OD”) and Joseph E.
19 Floren (“FD”) served and filed herewith, the Complaint filed on January 24, 2013 and all other
20 papers on file in this action, and on such other matters that may be presented to the Court. Mr.
21 Okada respectfully requests that his Motion be heard as soon as practicable.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

24 In its effort to deceive shareholders into removing Mr. Okada from its Board, Wynn
25 Resorts has presented them with a grotesquely slanted Proxy riddled with material
26 misrepresentations and omissions of material fact regarding the purported reasoning behind the
27 Removal Proposal suddenly urged on by the Executive Committee of the Board. The Proxy falls
28 far short of the “‘balanced,’ ‘truthful,’ and ‘materially complete’ account” of the facts that Wynn

1 Resorts was required by law to provide.

2 Mr. Okada is a founding director of Wynn Resorts and until very recently was its largest
 3 shareholder, controlling 19.66% of the Company's outstanding common stock through Aruze
 4 USA, Inc. ("Aruze USA"), of which Mr. Okada is the President and majority owner of its parent
 5 company, Universal Entertainment Corporation ("Universal"). Although Wynn Resorts' Board
 6 unlawfully redeemed and canceled Aruze USA's entire equity interest in February 2012 – thus
 7 converting Aruze USA into Wynn Resorts' largest creditor – Mr. Okada seeks the restoration of
 8 those shares in other litigation initiated by Wynn Resorts, and to continue to exercise the good
 9 stewardship of the Company as both a major shareholder and a director.

10 Wynn Resorts issued the materially false and misleading definitive proxy statement that is
 11 the subject of this motion on January 3, 2013. FD Ex. A. The Proxy announces that the Board,
 12 acting through an "Executive Committee" comprised of all directors other than Mr. Okada, has
 13 called a Special Meeting of the Company's shareholders for February 22, 2013, at which the
 14 Executive Committee will seek shareholders' approval of a proposal to remove Mr. Okada from
 15 the Board, despite the fact that in 2011 he earned a three-year extension of the office he has held
 16 since Wynn Resorts' inception in 2002. The Proxy misstates numerous material facts regarding
 17 the "independent" investigation and other purported reasons for the Executive Committee's
 18 Removal Proposal in order to cover up the truth – the Company seeks Mr. Okada's removal
 19 because he represents a threat to Steve Wynn's power and asked too many questions about the
 20 Company's shady dealings in Macau. Mr. Okada details below these violations of Section 14(a)
 21 of the 1934 Act and Rule 14a-9 thereunder.

22 Because the Special Meeting is rapidly approaching, a preliminary injunction is necessary
 23 to prevent irreparable harm to Mr. Okada through the loss of his position as a director. Mr.
 24 Okada stands to lose that right if ousted on the basis of the one-sided, biased and incomplete
 25 attempted indictment in the Proxy. Moreover, the Executive Committee's own actions – delaying
 26 its effort to remove Mr. Okada for nearly a year, and citing only illusory threats in the Proxy –
 27 demonstrate that the balance of harms tip in Mr. Okada's favor.

28

1 **II. STATEMENT OF FACTS**

2 **Background and Founding of Wynn Resorts.** Mr. Okada is an experienced
 3 entrepreneur in the gaming business who founded Tokyo-based Universal in 1969 and is now its
 4 Chairman. He first met Steve Wynn in 2000, shortly following Wynn's public ouster as CEO of
 5 Mirage Resorts. Wynn was anxious to rebuild his reputation on the strip, but lacked the capital to
 6 launch a substantial project. Unlike Las Vegas insiders, Mr. Okada shared Wynn's vision and
 7 was willing to become his partner and financier. Mr. Okada arranged for Aruze USA (a
 8 Universal subsidiary) to contribute \$260 million in startup capital to Valvino Lamore, LLC
 9 ("Valvino"), the company he co-founded with Wynn to build a new casino from the old Desert
 10 Inn (now the Company's flagship resort, Wynn Las Vegas), which later became Wynn Resorts.
 11 Through Aruze USA, Mr. Okada had contributed over \$450 million to the venture by the time the
 12 Company went public as Wynn Resorts in October 2002.

13 **Mr. Okada's Role as Director.** Perhaps Mr. Okada's most important contributions to the
 14 Company have been as a director, a position he has held since before Wynn Resorts' initial public
 15 offering in October 2002. OD ¶7. Mr. Okada served as Vice Chairman of the Board from that
 16 time until the elimination of that position in 2011. His stalwart management has earned him
 17 multiple reelections to the Board. Most recently, upon the recommendation of the Board, the
 18 shareholders elected Mr. Okada on May 17, 2011 to serve as a director for another three years,
 19 until the 2014 Annual Meeting of shareholders. FD Ex. B at 2. During Mr. Okada's directorship,
 20 the Company has grown and prospered and its stock price has consistently outperformed the
 21 market, to the benefit of all shareholders. OD ¶4; *see* FD Ex. C at 35.

22 Although Mr. Okada and Steve Wynn began as equal partners, by 2011 Mr. Okada's
 23 Aruze USA owned 24,549,222 shares of Wynn Resorts stock, nearly 20% of the outstanding
 24 shares, making it the Company's largest shareholder. FD Ex. D at 26. By contrast, Steve Wynn's
 25 stake had dwindled to 10,026,708 shares, about 8% of the shares outstanding, as a result of his
 26 various dispositions of stock and a divorce settlement. *Id.*

27 **Disagreement with Steve Wynn over the Company's Macau Activities.** As a director,
 28 Mr. Okada has always worked to ensure that the Company's business was conducted correctly.

1 OD ¶7. By 2011, however, Mr. Okada had become concerned about the propriety of the
 2 Company's efforts to expand in Macau, China. In the Spring of 2011, Steve Wynn asked the
 3 Board to rubber-stamp an incredible \$135 million "donation" to the University of Macau
 4 Development Foundation. *Id.* ¶11. The Chancellor of the University of Macau also oversaw
 5 gaming regulation in Macau, this "donation" would represent 70% of the small school's
 6 endowment, and Wynn Resorts was at the same time seeking a government concession to begin a
 7 new casino resort project on Macau's Cotai strip. Mr. Okada objected to the unprecedented
 8 donation, alone among all members of the Board. *Id.*; FD Ex. A at 13. The Board approved
 9 Steve Wynn's donation plan over Mr. Okada's objection, however, and shortly after the \$135
 10 million pledge the Company received the concession from the Macau government for its Cotai
 11 project that it had been seeking for five years. *See FD Ex. E* at 2.

12 The absurdly large and suspiciously timed "donation" appeared obviously improper,
 13 leading Mr. Okada to ask more questions and seek access to related books and records, a nearly
 14 unqualified right to which he is entitled as a director. *See OD ¶12.* Though he is still awaiting
 15 production of meaningful documents from the Company, *id.*, Mr. Okada has independently
 16 obtained copies of documents that, on their face, show there is much more worthy of investigation
 17 regarding Steve Wynn's activities in Macau. *See id. ¶13.* He has written the Board urging the
 18 appointment of a special investigator to lead a truly independent investigation regarding
 19 additional highly suspect agreements of which he has learned independently from his role as a
 20 director. OD Ex. C.

21 **Wynn's Retaliatory "Investigations" and Share Redemption.** When Mr. Okada began
 22 asking questions about Macau, Steve Wynn resolved to manufacture an excuse to get rid of him.
 23 Without Mr. Okada's knowledge, Wynn Resorts commissioned two purported "investigations" to
 24 no apparent effect (and the results of which it has refused to disclose to Mr. Okada), and then
 25 finally engaged the law firm Freeh Sporkin & Sullivan LLP ("Freeh Sporkin") to conduct yet
 26 another purportedly "independent" investigation into Mr. Okada and his companies' activities.
 27 *See OD ¶21; FD Ex. A at 8.* In fact, this investigation was anything but "independent" – Freeh
 28 Sporkin admitted that it was directed and controlled by Company management. FD Ex. F at 1.

1 And despite his status as a director, Mr. Okada was not made privy to the subjects or process of
 2 the Freeh Sporkin investigation. OD ¶¶14-15. Because the Company and Freeh Sporkin
 3 deliberately kept him in the dark, Mr. Okada was completely unaware until Mr. Freeh interviewed
 4 him on February 15, 2012 that the principal focus of the Freeh Sporkin investigation (and
 5 apparently already-written report) was actually a series of hospitality expenses that had been
 6 reimbursed years earlier by Universal, the Japan-based public company of which Mr. Okada is
 7 Chairman – matters on which Mr. Okada had little or no personal knowledge, and as to which he
 8 could not have been expected to provide any details without an opportunity to research the facts.
 9 OD ¶15.

10 On February 18, 2012, less than three days after Mr. Okada was granted his first and only
 11 opportunity to meet with Freeh Sporkin investigators, Freeh Sporkin gave its final report (the
 12 “Freeh Report”) to the Wynn Resorts Board (except for Mr. Okada, who did not receive a copy
 13 and was cut off from the meeting). *Id.* ¶¶16-18. The day before, Wynn had threatened to reveal
 14 the report unless Mr. Okada would sell Aruze USA’s stock at a discount, notwithstanding that
 15 Freeh had promised Mr. Okada an opportunity to respond to his report after obtaining a copy. *Id.*
 16 ¶18. This promise was immediately broken. On February 18, before Mr. Okada even received a
 17 copy of the report, let alone had any opportunity to respond to it, the Board voted to cancel and
 18 forcibly redeem Aruze USA’s 24,549,222 shares of Company stock in exchange for a discounted
 19 10-year note, established an “Executive Committee” of directors other than Mr. Okada to conduct
 20 all Company business, and overnight initiated litigation against Mr. Okada, Universal, and Aruze
 21 USA in Clark County District Court, Nevada. *See FD Ex. A* at 10-11.

22 **Wynn’s Effort to Remove Mr. Okada as Director.** Although Steve Wynn had
 23 successfully leveraged his influence over the Board to oust Aruze USA as a majority shareholder
 24 (the illegality of which will be established in separate litigation), it would not be so easy to
 25 remove Mr. Okada from his elected position as a director of the Company, which may be done
 26 only by two-thirds of the voting power of all issued and outstanding stock. *See Nev. Rev. Stat. §*
 27 *78.335.* The Company initiated this effort in March 2012, *see FD Ex. G*, then abandoned it, and
 28 took no action to remove Mr. Okada at its November 2012 Annual Meeting. *See id. Ex. H* at 2.

1 Finally, on January 3, 2013, the Executive Committee caused Wynn Resorts to file the
 2 Proxy giving rise to this Complaint. The Proxy notices a Special Meeting of the Company's
 3 shareholders in Las Vegas on February 22, 2013, for the following exclusive purposes:

4 1. To consider and vote on a proposal to remove Mr. Kazuo Okada
 5 as a director of the Company (the "Removal Proposal"); and
 6 2. To consider and vote on a proposal to adjourn the Special
 7 Meeting to a later date, if necessary or appropriate in the view of
 8 the Board of Directors of the Company (the "Board") or the
 9 Executive Committee of the Board (the "Executive Committee"), to
 10 solicit additional proxies in favor of the Removal Proposal if there
 11 are insufficient proxies at the time of such adjournment to approve
 12 the Removal Proposal (the "Adjournment Proposal").

13 In the Notice of Special Meeting, the Executive Committee recommends "that stockholders vote
 14 'FOR'" both proposals, contending that on the basis of the February 2012 Freeh Report "that it is
 15 essential from a gaming regulatory standpoint to remove Mr. Okada from the Board and that
 16 failure to take steps to separate the Company from Mr. Okada . . . poses material risks to the
 17 Company." FD Ex. A at 8. On January 25, 2013, the Executive Committee sent a further letter to
 18 shareholders urging them to vote for the Removal Proposal, repeating these statements. FD Ex. I.

19 The Proxy represents a usurpation of shareholders' right to participate in corporate
 20 governance. Its one-sided and incomplete account of events makes numerous material
 21 misstatements and omits material facts necessary to render other statements therein not
 22 misleading, as detailed below.

23 **III. ARGUMENT**

24 Mr. Okada seeks a preliminary injunction because he "is likely to succeed on the merits,"
 25 "likely to suffer irreparable harm in the absence of preliminary relief," the "balance of equities
 26 tips in his favor," and "an injunction is in the public interest." *Winter v. Natural Res. Def.*
Council, Inc., 555 U.S. 7, 20 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.
 27 2009); *Winnemucca Indian Colony v. United States ex rel. Dep't of Interior*, 837 F. Supp. 2d
 28 1184, 1188-90 (D. Nev. 2011).

1 A. **Mr. Okada Is Likely to Succeed on the Merits of His Complaint Against**
 2 **Wynn Resorts for Disseminating False and Misleading Proxy Materials in**
 3 **Violation of Section 14(a) of the 1934 Act**

4 This Court should enjoin the February 22, 2013 Special Meeting because Mr. Okada is
 5 likely to succeed on his claim that the Company’s false and misleading Proxy violates Section
 6 14(a) and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9.¹ “Section 14(a) … makes it unlawful for
 7 directors to provide information that is false or misleading with respect to any material fact in a
 8 proxy statement.” *St. Louis Police Ret. Sys. v. Severson*, No. 12-CV-5086, 2012 U.S. Dist.
 9 LEXIS 152392, at *11 (N.D. Cal. Oct. 23, 2012); *accord Shoen v. AMERCO*, 885 F. Supp. 1332,
 10 1346-48 (D. Nev. 1994) (finding 14a-9 violation where proxy “omitted mention of at least one
 11 material fact”). “Omission of information from a proxy statement is actionable if either the SEC
 12 regulations specifically require disclosure of the omitted information in a proxy statement, or the
 13 omission makes other statements in the proxy statement materially false or misleading.” *Seinfeld*
 14 *v. Gray*, 404 F.3d 645, 650 (2d Cir. 2005). Disclosures must “provide a ‘balanced,’ ‘truthful,’
 15 and ‘materially complete’ account of all matters they address.” *In re Netsmart Techs., Inc.*
 16 *S’holders Litig.*, 924 A.2d 171, 199-200 (Del. Ch. 2007) (internal citation omitted); *see Shaev v.*
 17 *Saper*, 320 F.3d 373, 381 (3d Cir. 2003) (“cryptic references” from which a shareholder might
 18 infer that other material information existed was not sufficient to comply with § 14(a) disclosure
 19 obligations). “[A] proxy statement that fails to ‘accurately depict the purposes or effects’ of the
 20 matters before the shareholders for a vote may be misleading.” *Severson*, 2012 U.S. Dist. LEXIS
 21 152392, at *13-14 (quoting *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1260-61 (Del. Ch.
 22 2003)). Indeed, when directors present a proposal to shareholders for approval, “[t]he Board is
 23 required to **disclose its motivations candidly.**” *ODS Techs.*, 832 A.2d at 1261 (emphasis added)
 24 (citing SEC Release No. 34-15230, 1978 WL 186739, at *2-3 (Oct. 13, 1978) (requiring

25 ¹ Mr. Okada’s motion is supported by his Declaration and the Declaration of Joseph E. Floren and
 26 its exhibits, as well as the Complaint and the exhibits thereto. This Court may properly consider
 27 all these documents in determining whether to issue a preliminary injunction. When evaluating a
 28 preliminary injunction motion, this Court has wide latitude to consider all types of evidence,
 including evidence that may not be admissible at the preliminary injunction stage. *See Johnson v.*
Couturier, 572 F.3d 1067, 1083 (9th Cir. 2009) (“A district court may . . . consider hearsay in
 deciding whether to issue a preliminary injunction.”); *Flynt Distrib. Co. v. Harvey*, 734 F.2d
 1389, 1394 (9th Cir. 1984) (“The trial court may give even inadmissible evidence some weight,
 when to do so serves the purpose of preventing irreparable harm before trial.”).

1 disclosure of reasons and “an explanation of the factors and/or principles supporting or serving as
 2 a foundation for the reason stated”).

3 In the context of misleading proxy solicitations, “[a]n omitted fact is material if there is a
 4 substantial likelihood that a reasonable shareholder would consider it important in deciding how
 5 to vote.” *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Put differently, “there must be
 6 a substantial likelihood that disclosure of the omitted fact would have been viewed by a
 7 reasonable investor as having significantly altered the ‘total mix’ of information made available.”
 8 *Id.*; *see also Miller v. Thane Int’l, Inc.*, 519 F.3d 879, 889 (9th Cir. 2008) (same). To raise its
 9 Removal Proposal lawfully, Wynn Resorts must ensure that its Proxy includes ***all*** material
 10 information bearing on its recommendation to strip Mr. Okada of his directorship – not simply
 11 those facts that best support its case. *See Shaev*, 320 F.3d at 381 (“Material not included in the
 12 proxy statement is generally not charged to the knowledge of the stockholder,” and thus past
 13 amendments to management compensation plan constituted material omissions from solicitation
 14 for new amendment); *United Paperworkers Int’l Union v. Int’l Paper Co.*, 985 F.2d 1190, 1198-
 15 200 (2d Cir. 1993) (information appearing in company’s 10-K, but not distributed to
 16 shareholders, was not part of “reasonably available mix” for purposes of evaluating § 14(a)
 17 omissions). The January 3 Proxy statement is false and misleading in the following material
 18 respects, each of which independently violates § 14(a) and warrants preliminary injunctive relief.

19 **1. The Biased and Admittedly Non-Independent Freeh Sporkin Report**

20 The January 3 Proxy relies extensively upon the February 2012 Freeh Report, which the
 21 Proxy describes as an “independent report” of an “independent investigation” that supposedly
 22 “uncovered and documented . . . more than three dozen instances over a three-year period in
 23 which Mr. Okada and his associates engaged in improper activities . . . in apparent violation of
 24 U.S. anti-corruption laws and in contravention of the Company’s Code of Conduct.” FD Ex. A at
 25 8. The Proxy goes on to claim that “Mr. Okada failed, during the [February 15, 2012] interview
 26 [of Mr. Okada by Freeh Sporkin] or subsequently, to offer evidence to contradict the findings of
 27 the Freeh Report or to exculpate himself or his affiliates.” *Id.* at 10. These statements are false
 28 and materially misleading.

1 The Freeh Sporkin investigation was anything but “independent” as claimed by Wynn
 2 Resorts. As the report itself (which is not included in the Proxy) admits, this “investigation” was
 3 “conducted ***under the sole direction of the [Wynn Resorts] Compliance Committee.***” FD Ex. F
 4 at 1 (emphasis added). The Compliance Committee that had “sole direction” of the investigation
 5 was dominated by Company management. Its three members were: (i) Wynn Resorts Executive
 6 Vice President and Chief Administrative Officer John Strzemp; (ii) Wynn Resorts Chief
 7 Operating Officer and Director Marc D. Schorr; and (iii) Wynn Resorts Director Robert Miller.
 8 The Company admits that Messrs. Strzemp and Schorr were members of management, not
 9 “independent” under any standard. FD Ex. J at 25-26; *id. Ex. D* at 28-29. Given that the
 10 investigation was directed and controlled by management, it does not meet any standard of
 11 “independence.” *See, e.g., In re Oracle Corp. Derivative Litig.*, 824 A.2d 917 (Del. Ch. 2003)
 12 (addressing “independence” standards for investigation led by directors). The Proxy does not
 13 disclose this, because the Company wishes to leverage the name and reputation of Mr. Freeh and
 14 to mislead its shareholders into concluding that his investigation was “independent.”

15 Moreover, as detailed in Mr. Okada’s Declaration, ¶¶14-21, and Complaint, ¶¶74-78, the
 16 Freeh Sporkin “investigation” was in fact an ambush, its outcome preordained and orchestrated in
 17 an adversarial fashion. Even Mr. Freeh described his report as “akin to a final brief being
 18 submitted with the opportunity for a response to be made.” FD Ex. K. Neither Mr. Freeh nor any
 19 of the Company’s lawyers provided Mr. Okada with meaningful information or documents
 20 regarding Mr. Freeh’s investigation while it was taking place. OD ¶15. Mr. Okada’s first chance
 21 to learn of the details being investigated by Freeh was at a day-long interview with Freeh Sporkin
 22 investigators in Tokyo on February 15, 2012, at which he learned for the first time that Freeh
 23 Sporkin was focused upon a series of hospitality expenses for which Universal had reimbursed
 24 Wynn Resorts years earlier – matters about which he had little or no knowledge. *Id.* At the
 25 interview, however, Mr. Freeh indicated to Mr. Okada that his report was all but complete, and
 26 rejected requests by Mr. Okada’s counsel to either review or provide additional information in
 27 response to the report before it would be forwarded to the Wynn Resorts Board on February 18,
 28 2012. *Id.* ¶¶15-18; FD Ex. K. The Company then immediately broke Mr. Freeh’s promise that

1 Mr. Okada would have “the opportunity for a response” after issuance of the report, and instead
 2 executed its strategy to deem Mr. Okada and his companies “unsuitable,” forcibly redeem Aruze
 3 USA’s shares, and file suit immediately after receiving the report on February 18, 2012, all before
 4 Mr. Okada even was permitted to see the report. *See* OD ¶¶20-21; FD Ex. A at 10-11. The
 5 Proxy’s claim that Mr. Okada “failed . . . to offer evidence to contradict the findings of the Freeh
 6 Report or to exculpate himself or his affiliates” deliberately gives the false impression that Mr.
 7 Okada had such an opportunity, which Wynn Resorts denied him.

8 The true purpose of the Freeh Report is best explained by the ultimatum communicated to
 9 Mr. Okada on the eleventh hour before its delivery to the Wynn Resorts Board. On February 17,
 10 2012, hours before the Special Meeting set for 9:00 am on February 18, Steve Wynn threatened
 11 through counsel that the Freeh Report would be distributed and considered by the Board if Mr.
 12 Okada did not sell his shares in Wynn Resorts to Steve Wynn personally at a substantial discount.
 13 OD ¶18. The Proxy does not disclose this, either.

14 Nor does the Proxy disclose that, to this day, none of the various exhibits quoted and
 15 referenced in the Freeh Report have been disclosed to Mr. Okada so that he might address and
 16 respond to them. OD ¶20. The Proxy even ignores the express hedging language in the Freeh
 17 Report, which did not reach conclusions that “improper activities” had actually occurred but
 18 instead only that “substantial evidence” had been developed in his Company-controlled
 19 investigation creating “appear[ances]” of such. Ex. F at 1-2.

20 Shareholders deserve to know how the Freeh Report was utilized as a device to personally
 21 enrich Steve Wynn and to tighten his monarchical grip over the Company. As the solitary pillar
 22 of purported evidence substantiating the Executive Committee’s argument that Mr. Okada should
 23 be removed as a director, the truth of the Freeh Report’s preparation is vitally important to the
 24 Removal Proposal, and the aforementioned false statements and material omissions are and will
 25 be highly material to the mind of a reasonable shareholder.

26 **2. The Company Code of Conduct and FCPA Training**

27 The January 3 Proxy states that “Mr. Okada is the only director of the Company who has
 28 not signed the Company’s Code of Conduct, despite repeated requests by the Company, and not

1 participated in mandatory FCPA training for directors for the past two years.” FD Ex. A at 9. In
 2 reality, Mr. Okada is a strong believer in conducting business ethically and in full compliance
 3 with the law everywhere in the world, and fully supports the principles behind the Company’s
 4 Code of Conduct, as was repeatedly made clear to Company representatives. OD ¶22.

5 At the outset, the Proxy deceives shareholders by failing to acknowledge that Mr. Okada
 6 has fully endorsed prior versions of the Wynn Resorts Code of Conduct. *Id.* The Proxy goes
 7 further astray by neglecting to disclose that this *Amended* Code of Conduct was prepared *after*
 8 Mr. Okada had already been asked to resign as a director, and included provisions that the
 9 Company knew Mr. Okada would be unable to accept without clarification due to his business as
 10 Chairman and principal owner of Universal. *Id.* Mr. Okada attempted, through his attorneys, to
 11 reach an agreement regarding certain provisions of the Amended Code of Conduct that could
 12 have hindered his ability to develop a casino in the Philippines, *see FD Ex. L*, a project that Wynn
 13 Resorts has been aware of since 2008. *Id. Ex. M* at 106. No agreement was reached, and Mr.
 14 Okada could not justify risking creating a legal issue regarding Universal’s substantial investment
 15 in the Philippines by signing an Amended Code of Conduct that arguably might prohibit it,
 16 offered by a Board that had already expressed its intention to remove him as a director. OD ¶22.

17 Meanwhile, the January 3 Proxy fails to acknowledge that Mr. Okada was precluded from
 18 attending the October 31, 2011 FCPA training session referenced therein. This training – again,
 19 scheduled *after* Mr. Okada was asked to resign as a director – fell on a date when Mr. Okada was
 20 obligated to be overseas and it was not feasible for him to attend. OD ¶23. The Company
 21 refused Mr. Okada’s request to either (i) reschedule or (ii) obtain a recording of the training
 22 session so that he could confirm he had reviewed it. *Id.*; *see also FD Ex. N*. By failing to
 23 disclose these facts, the Proxy creates the materially misleading impression that Mr. Okada was
 24 provided an opportunity but failed to attend the mandatory training. The reality is that the
 25 Company refused to schedule a training session on a date when Mr. Okada could reasonably
 26 attend. *See FD Ex. N.*

27 The statements in the Proxy create an impression in the mind of a reasonable shareholder
 28 that Mr. Okada willfully evaded good faith legal compliance precautions by Wynn Resorts. This

1 simply is not the case, and Wynn Resorts shareholders deserve to know the truth.

2 **3. The “Imperative” Need to Remove Mr. Okada**

3 The Proxy misleadingly claims that it is “imperative that Mr. Okada be removed as a
 4 director of the Company at the [February 22, 2013] Special Meeting,” FD Ex. A at 8, as opposed
 5 to allowing his term to expire at the regular 2014 Annual Meeting of shareholders, *see id.* Ex. B at
 6 2, which has not yet been scheduled. In a baseless effort to justify its extraordinary act of calling
 7 a Special Meeting, the Executive Committee cites the Company’s “strategic plan to expand its
 8 operations into new jurisdictions,” including Pennsylvania and Massachusetts. The Proxy
 9 thereafter claims that Mr. Okada’s removal is necessary to protect Wynn Resorts’ “integrity and
 10 stature in the gaming industry” as it “appl[ies] for and receiv[es] additional gaming licenses
 11 (including jurisdictions where the Company has recently filed applications).” FD Ex. A at 13.

12 Contradicting this apparent urgency is the omitted fact of the Company’s abandoned
 13 efforts from March 2012 to implement the same extraordinary strategy that it attempts today. On
 14 March 7, 2012, the Executive Committee caused Wynn Resorts to file preliminary proxy
 15 materials (the “March 2012 Proxy”) for a proposed Special Meeting of stockholders for the
 16 purpose of voting on a proposal to remove Mr. Okada as a director. *Id.* Ex. G. Then, as now, the
 17 Committee purportedly believed “it is essential from a gaming regulatory standpoint to remove
 18 Mr. Okada from the Board and that failure to take steps to separate the Company from Mr. Okada
 19 and his affiliates poses material risks to the Company.” *Id.* at 3. Despite the imminent threat that
 20 Mr. Okada has allegedly represented, the Executive Committee found it in the Company’s best
 21 interests to wait nearly nine months before suddenly calling its shareholders to action. The
 22 January 3 Proxy fails to disclose why it is now supposedly urgent to remove Mr. Okada from the
 23 Board given that it has not been urgent since early 2012.

24 The January 3 Proxy also conveniently omits any mention of the fact that the Company
 25 has sat on the proposal to remove him as a director for nearly a year following the Executive
 26 Committee’s “unsuitability” determination in February 2012, when according to the January 3
 27 Proxy, the Company’s Gaming Compliance Committee had *already* concluded a “year-long
 28 investigation” into Mr. Okada’s investments overseas. *Id.* Ex. A at 8.

1 Also omitted is the fact that the Company and its Executive Committee waived another
 2 opportunity to raise the supposedly urgent need to remove Mr. Okada at the Company's regular
 3 2012 Annual Meeting of shareholders, which was held on November 2, 2012. *See id.* Ex. H at 2.
 4 The Annual Meeting provided an appropriate forum for the Executive Committee to raise, and for
 5 shareholders to decide, the issue, if it really needed to be decided. But the Executive Committee
 6 again did nothing, for reasons it has not explained. The January 3 Proxy discloses no facts that
 7 supposedly support Mr. Okada's removal which have come to light in the two months between
 8 the November 2, 2012 Annual Meeting and the January 3 Proxy for a Special Meeting.

9 And while the Proxy states that “[i]f the Removal Proposal is approved by the Company's
 10 stockholders, the size of the Board will be reduced from nine to eight,” FD Ex. A at 14, nowhere
 11 does it remind shareholders how Steve Wynn very recently consolidated his control when the
 12 Executive Committee decreed in a December 13, 2012 Form 8-K that four longtime directors had
 13 “resigned from the Board” to “devote more time to their other business commitments” and “to
 14 reduce the number of inside directors.” *Id.* Ex. Q at 2. The Board was thus reduced in size from
 15 twelve to nine members and, according to the same Form 8-K, Steve Wynn's term of directorship
 16 was extended from 2013 to the Annual Meeting in 2014. *Id.*

17 It should also be remembered that, in making its claims of “unsuitability,” the Proxy fails
 18 to disclose that Mr. Okada, Aruze USA, and Universal were found “suitable” by the Nevada
 19 Gaming Control Board in 2005, and that there has been no modification to that finding. OD ¶6.
 20 No real explanation is offered why a Special Meeting is suddenly needed to support a planned
 21 expansion, nearly two years after the Compliance Committee initiated its purported investigation
 22 into Mr. Okada, especially considering the Company's 2013 Annual Meeting is expected to be
 23 held “during the first week of May 2013.” *Id.* Ex. A at 15.

24 **4. Mr. Okada's Investments in the Philippines**

25 The Proxy contends that “[i]n January 2011, after the Company became aware that Mr.
 26 Okada was falsely representing to multiple people that he . . . and the Company were involved in
 27 a joint venture together in the Philippines, the Company retained an independent investigatory
 28 firm to conduct an independent investigation into various risks associated with investing in the

1 gaming industry in the Philippines.” FD Ex. A at 9. The Proxy then asserts that about a month
 2 later, on February 24, 2011, the Board held a meeting during which (1) it received the conclusions
 3 of an independent investigation concerning “the risks of participating in the gaming industry in
 4 the Philippines” and the FCPA; (2) Mr. Okada supposedly challenged the other directors’
 5 statements about the FCPA and endorsed “hiring ‘third party consultants’ to give gifts to
 6 officials” abroad; and (3) the board thereafter recommended against participation in Mr. Okada’s
 7 Philippines venture. *Id.*

8 The only thing that is accurate about the Proxy in this regard is that Wynn Resorts
 9 ultimately declined – after several years of consideration – the opportunity to be involved in a
 10 casino resort project in the Philippines. In truth, Wynn Resorts and Steve Wynn in particular had
 11 been well aware of Mr. Okada’s efforts to pursue a casino project in the Philippines, since at least
 12 April 2008, and have expressly supported those efforts.

13 In September 2009, the IPO Prospectus for Wynn Macau, Ltd. (a subsidiary of Wynn
 14 Resorts) also acknowledged and ratified Universal’s plans to open a casino in the Philippines:

15 In addition to its investment in Wynn Resorts, Limited,
 16 *[Universal] has invested in the construction of a hotel casino resort*
 17 *in the Philippines, which is anticipated to open to the public in*
 18 *2010.* Mr. Okada confirms that, as at the Latest Practicable Date,
 19 except for his indirect shareholding interests in Wynn Resorts,
 20 Limited through Aruze USA, Inc., neither he nor his associates
 holds, owns or controls more than 5% voting interests in an entity
 which, directly or indirectly, carries on, engages, invests,
 participates or otherwise is interested in any company, business or
 operation that competes, or is reasonably expected to compete, with
 the business carried on by us in Macau.

21 FD Ex. M at 106 (emphasis added). Moreover, Steve Wynn himself acknowledged his
 22 longstanding knowledge of the Philippines project on a May 1, 2008 conference call with stock
 23 analysts:

24 Well, first of all, I love Kazuo Okada as much as any man
 25 that I’ve ever met in my life. He’s my partner and my friend. And
 26 there is hardly anything that I won’t do for him. Now, we are not at
 27 the present time an investor, nor do we contemplate, an investment
 28 in the Philippines. This is something that Kazuo Okada and his
 company, [Universal], has done on its own initiative. *He consults*
me and has discussed it with me extensively and I’ve given him my
own personal thoughts on the subject and advice. And, to the extent
that he comes to me for any more advice or input, all of us here at

the Company will be glad to give him our opinions. But that's short of saying this is a Wynn Resorts project. It is a [Universal] project.

FD Ex. P at 9 (emphasis added).

Though no investment was contemplated in 2008, Steve Wynn was reconsidering the opportunity by 2010. On June 14, 2010, Steve Wynn and Mr. Okada jointly visited Manila to conduct due diligence on behalf of Wynn Resorts and Universal. As illustrated in photographs attached to Mr. Okada's Complaint, ¶62, the pre-arranged trip involved meetings with dignitaries and officials and informational presentations on the project.

The Proxy also fails to disclose that, in April 2011, *months after* its purported “discovery” of Mr. Okada’s “falsely representing” that Universal and Wynn Resorts were involved in a joint venture, and months after the Board supposedly confronted Mr. Okada about Universal’s Philippines project and Mr. Okada’s purportedly unacceptable statements about FCPA compliance issues, Wynn Resorts’ Board unanimously nominated Mr. Okada and recommended that shareholders reelect him to the Board at the Company’s May 17, 2011 Annual Meeting. FD Ex. D at 8. In urging shareholders to re-elect Mr. Okada as a director, Wynn Resorts stated in its April 7, 2011 proxy solicitation, publicly filed with the SEC, that Mr. Okada still “br[ought] an international perspective that is essential to the Company’s strategic vision. In addition, his primary business as a manufacturer and developer of gaming equipment adds significant value to our operations.” *Id.* at 9. Without disclosing the Compliance Committee’s alleged concerns over Mr. Okada’s purported views of the permissibility of foreign bribery, the Company further stated to all shareholders in the April 7, 2011 filing that “Aruze USA has been found suitable by the Nevada Gaming Commission as a major shareholder of the Company.” *Id.*

The reason why Wynn Resorts makes no mention in its current, January 3 Proxy of its previous, truthful, laudatory statements about Mr. Okada in connection with the May 2011 Annual Meeting and Mr. Okada’s election to the directorship that is now at issue is because the Company’s prior statements were true and are inconsistent with Wynn Resorts’ more recently invented, false theories to the effect that Mr. Okada is “unsuitable” and that the Company was purportedly gravely concerned about Universal’s activities and Mr. Okada’s supposed statements

1 to the Board as of and prior to April 2011. Without full and truthful disclosure by Wynn Resorts
 2 of the foregoing omitted and/or misstated material facts, shareholders of Wynn Resorts are likely
 3 to be misled in making their decision whether to accept the Executive Committee's
 4 recommendation that Mr. Okada be removed from the Board.

5 **5. Steve Wynn's Activities in Macau**

6 The January 3 Proxy meanwhile attempts to deflect Mr. Okada's criticism of a May 2011
 7 contribution by Wynn Macau of \$135 million to the University of Macau Development
 8 Foundation. The Proxy states that “[t]he pledge was consistent with the Company's long-
 9 standing practice of providing philanthropic support for deserving institutions in the markets in
 10 which it operates” and followed “an extensive analysis which concluded that the gift was made in
 11 accordance with all applicable laws.” FD Ex. A at 12-13.

12 The January 3 Proxy, however, fails to disclose that prior to making its \$135 million
 13 commitment to the Development Fund, Wynn Resorts had been pursuing a land concession on the
 14 Cotai Strip in Macau for the development of a new casino since at least February 2006. *Id. Ex. Q*
 15 at 2. Nor does the January 3 Proxy disclose that the Chancellor of the University of Macau also
 16 has ultimate oversight of gaming matters in Macau; that the \$135 million pledge represents
 17 approximately 70% of the University of Macau Development Fund's entire endowment; and that
 18 shortly after the “donation,” in September 2011, Wynn Resorts finally received the land
 19 concession it had been seeking on the Cotai Strip for approximately five years. *Id. Ex. E* at 2.
 20 All of this transpired within months of the February 24, 2011 Board meeting about FCPA
 21 compliance referenced in the January 3 Proxy. *Id. Ex. A* at 9.

22 The Proxy also is false and misleading in that Wynn Resorts' purported “long-standing
 23 practice” of philanthropy does not exist. The Proxy fails to disclose that the only other charitable
 24 donation Wynn Resorts has disclosed in SEC filings in its history was a \$10 million Ming
 25 dynasty vase donated to the Macau Museum in 2006—the same year in which Wynn Resorts first
 26 applied for a land concession on the Cotai Strip in Macau. *Id. Ex. R* at 42-43; *id. Ex. Q* at 2.

27 These two “donations” are not isolated examples of how Steve Wynn has jeopardized the
 28 Company's lucrative gaming licenses by suspicious and unusually lavish donations designed to

1 curry favor with foreign government officials. As the Wall Street Journal reported² on July 1,
 2 2012, the \$4 billion Cotai project – referred to by Steve Wynn as “the single most important
 3 project” in the Company’s history – has been linked to a \$50 million payment by Wynn Resorts
 4 to an obscure Macau company and individuals with connections to Macau’s former top
 5 government official, his close associate and a businessman from a prominent Beijing family. OD
 6 ¶13; *see id. Ex. C.* The Proxy discloses nothing about this.

7 The Proxy also fails to disclose that, despite repeated demands by Mr. Okada, Steve Wynn
 8 has refused to disclose to Mr. Okada how he actually spent about \$90 million that Mr. Okada
 9 caused Aruze USA to contribute to the Company’s predecessor in 2002. On October 15, 2012,
 10 the District Court for Clark County, Nevada ordered Wynn Resorts to disclose to Mr. Okada
 11 “[e]xpenditures greater than \$10,000 from the \$120 million capital contribution of Aruze USA,
 12 Inc.; and [e]xpenditures of any amount for or on behalf of government or gaming officials from
 13 the \$120 million capital contribution of Aruze USA, Inc.” FD Ex. T at 2. Despite this court
 14 order, Mr. Okada has still not received a satisfactory explanation of how his money was used, or
 15 the extent to which Steve Wynn abused his trust by making expenditures for improper purposes.
 16 OD ¶12. Again, the Proxy discloses nothing about this.

17 Mr. Okada recognized the mortal risk to the Company posed by Steve Wynn’s willingness
 18 to pay to play with foreign officials, but the Company has sought to push him aside for asking the
 19 wrong questions. As noted in the section titled “RISK FACTORS” of the Company’s most recent
 20 10-K filing with the SEC, “[w]e are entirely dependent upon our resorts in Las Vegas and Macau
 21 for all our cash flow. As a result, we are subject to a greater degree of risk than a gaming
 22 company with more operating properties.” FD Ex. S at 20-21. The filing also acknowledges
 23 “[f]ailure to adhere to the regulatory and gaming environment in Macau could result in the
 24 revocation of Wynn Macau, S.A.’s concession,” or “risk that U.S. regulators could determine that
 25 Macau’s gaming regulatory framework has not developed in a way that would permit us to
 26 conduct operations in Macau in a manner consistent with the way in which we intend, or the
 27

28

² Kate O’ Keefe, *In Wynn’s Macau Deal, a Web of Political Ties*, THE WALL STREET JOURNAL, (July 1, 2012),
 available at <http://online.wsj.com/article/SB10001424052702304782404577488692803611700.html>.

1 Nevada gaming authorities require us, to conduct our operations in the United States.” *Id.* at 23.

2 Shareholders voting on the Removal Proposal need to know the complete set of facts
 3 behind Steve Wynn’s pursuit of the Cotai gaming concession in order to properly evaluate the
 4 January 3 Proxy’s claim that “an extensive analysis” by the Company concluded that the \$135
 5 million University of Macau donation “was made in accordance with all applicable laws,” as well
 6 as the attendant false insinuation that Mr. Okada’s opposition to the donation was unfounded and
 7 interfered with effective governance of the Company.

8 In summary, the Executive Committee made no attempt to provide a full and complete
 9 account of, for example, how the Freeh Report was finalized and then acted upon before its
 10 subject had any opportunity to discover and respond to its allegations, or how the Company
 11 delayed its “imperative” efforts to remove Mr. Okada for nearly a year after its aborted March
 12 2011 Proxy, which levied identical allegations of “unsuitability.” “A proxy statement should
 13 inform, not challenge a shareholder’s critical wits.” *Virginia Bankshares, Inc. v. Sandberg*, 501
 14 U.S. 1083, 1097 (1991). The Board’s failure to inform assumes heightened materiality in light of
 15 the clear pecuniary and managerial gains Steve Wynn and his Executive Committee stand to gain
 16 by removing their greatest obstacle to control. The January 3 Proxy “actually cross[es] the line
 17 from omitting material information to becom[ing] affirmatively misleading.” *ODS Techs.*, 832
 18 A.2d at 1260-61 (materially misleading presentation of amendments was purportedly designed to
 19 discourage hostile takeover bids generally, but in actuality failed to mention another company
 20 with known interest in an acquisition); *see also Berkman v. Rust Craft Greeting Cards, Inc.*, 454
 21 F. Supp. 787, 791-92. (S.D.N.Y. 1978) (proxy solicitation’s failure to disclose known conflict of
 22 interest among candidates for renomination to board “bordered upon a breach of fiduciary duty,”
 23 in addition to satisfying § 14(a) materiality requirement). The Executive Committee omitted a
 24 “full and fair explanation of the rationale for [the] proposal that [they] are recommending
 25 stockholders to approve,” and the Committee’s failure “to disclose its motivations candidly”
 26 constitutes a clear violation of Section 14(a). *See ODS Techs.*, 832 A.2d at 1261.

27

28

B. Mr. Okada Will Suffer Irreparable Harm Absent a Preliminary Injunction to Halt the Special Meeting in Which Wynn Seeks to Remove Mr. Okada from Its Board of Directors

If the Special Meeting goes forward and Mr. Okada is removed from the Company’s Board due to the misleading proxy materials, Mr. Okada – and the Company – will suffer irreparable harm. *See Severson*, 2012 U.S. Dist. LEXIS 152392, at *17 (finding irreparable harm because “the alternative of invalidating the election at a later date, and unwinding any transactions that might be made in reliance on the results of a tainted election, all point to the conclusion that a post hoc remedy is inadequate”).

Indeed, the right to participate in corporate management has intrinsic value, and loss of that power even for a short period may constitute irreparable harm. The Second Circuit in *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101 (2d Cir. 2003), found that, “a bargained-for minority right to participate in corporate management has value in and of itself and a denial of that right, without more, can give rise to irreparable harm,” particularly where that right is “central to preserving an agreed-upon balance of power … in corporate management.” *Id.* at 114-15; *see Street v. Vitta*, 685 F. Supp. 379, 384 (S.D.N.Y. 1988) (special meeting to elect new directors threatened irreparable harm to shareholder-directors, who stood to lose rights to inspect corporate books and to exert a “voice in management”); *Gitlitz v. Bellock*, 171 P.3d 1274, 1280 (Colo. Ct. App. 2007) (following *Wisdom Import* and “conclud[ing] that a loss of a contractual right to manage and control a business may constitute irreparable harm; that monetary damages are an inadequate remedy for such a loss; and that a contractual right to participate in the management and control of a business has intrinsic value in and of itself that may not be adequately compensated by monetary damages”); *see also Palumbo v. Deposit Bank*, 758 F.2d 113, 116 (3d Cir. 1985) (plaintiff-director’s removal premised on misleading proxy solicitation constituted injury in fact sufficient to confer § 14(a) standing). This perfectly captures the reasons why Mr. Okada – as well as the Company’s shareholders – will suffer irreparable harm if Mr. Okada is removed pursuant to the misleading Proxy. Mr. Okada is a central component of the “balance of power” at the Company as he is the only director who is not aligned with Steve Wynn, and he is the only director who dared object to the \$135 “donation” and Wynn’s Macau

1 activities. With Mr. Okada off the Board, Steve Wynn and his allies would be free to run the
 2 Company unchecked by the truly independent voice that Mr. Okada provides, harming both Mr.
 3 Okada and the Company's shareholders.

4 A special election ousting Mr. Okada will deprive him of a vested right to conduct
 5 corporate governance, and almost certainly ensure that he is unable to regain that right.

6 **C. The Balance of Equities Weighs in Mr. Okada's Favor**

7 "The balance of hardships favors enjoining a vote in which shareholders were not
 8 provided material information." *Severson*, 2012 U.S. Dist. LEXIS 152392, at *17. Because this
 9 litigation would proceed well beyond the February 22 Special Meeting – and perhaps even
 10 beyond the expiration of Mr. Okada's elected term in 2014 – Mr. Okada will suffer great inequity
 11 if his candidacy is determined based on the one-sided and materially misleading January 3 Proxy.
 12 Conversely, Wynn Resorts will suffer minimal – if any – harm if forced to correct its disclosures
 13 so that they are no longer false and misleading. *See id.* at *16 ("[I]t is appropriate for the court to
 14 address material disclosure problems through the issuance of a preliminary injunction that persists
 15 until the problems are corrected."); *Krauth v. Executive Telecard, Ltd.*, 890 F.Supp. 269, 292
 16 (S.D.N.Y.1995) (enjoining vote until management distributed corrected proxy materials). At
 17 worst, the Company will be able to raise Mr. Okada's candidacy at the 2013 Annual Meeting
 18 scheduled for May, where it can provide shareholders with a fair and accurate account of why the
 19 directorship earned by Mr. Okada must be revoked.

20 Critically, Wynn Resorts has delayed for too long to argue for Mr. Okada's immediate
 21 removal. Given that the Compliance Committee admittedly began its investigations into
 22 purported improprieties indulged in by Mr. Okada *before* he garnered shareholders' approval for
 23 a three-year extension of his term at the 2011 Annual Meeting, the threats posed by his
 24 "unsuitability" are of no real urgency. After aborting its attempt to hold a similar Special
 25 Meeting almost a year ago, and after failing to seek the two-thirds vote necessary to remove Mr.
 26 Okada at its regular meeting of shareholders on November 2, 2012, the Executive Committee
 27 cannot now honestly assert that a removal vote is "imperative."

28

1 **D. A Preliminary Injunction Is in the Public's Interest**

2 In addition to benefiting Wynn Resorts' shareholders at large, a preliminary injunction
 3 will also serve the public interest. As this Court aptly observed, in explaining why the business
 4 judgment rule did not apply to shareholder voting matters:

5 [S]hareholders normally have "only two protections against
 6 perceived inadequate business performance. They may sell their
 7 stock ..., or they may vote to replace incumbent board members." Indeed,
 8 one of the justifications for the business judgment rule's
 9 insulation of directors from liability for almost all of their decisions
 10 is that unhappy shareholders can always vote the directors out of
 office. Thus, interference with shareholder voting is an especially
 serious matter.... [W]hen a board interferes with shareholder voting
 it interferes with the very "allocation, between shareholders as a
 class and the board, of effective power with respect to governance
 of the corporation."

11 *Shoen v. AMERCO*, 885 F. Supp. 1332, 1340-41 (D. Nev. 1994) (quoting *Blasius Indus. v. Atlas*
 12 *Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)); *see also Lone Star Steakhouse & Saloon, Inc. v.*
 13 *Adams*, 148 F. Supp. 2d 1141, 1150 (D. Kan. 2001) ("[A]ssuming the existence of materially
 14 misleading information, a full disclosure of such information, prior to any vote based thereon,
 15 will best serve the shareholding public.").

16 Indeed, the very manner in which the Proxy is structured – providing that all executed and
 17 unrevoked proxies "will be voted 'FOR' the Removal Proposal and 'FOR' the Adjournment
 18 Proposal" unless otherwise specified by the shareholder – subverts ordinary corporate governance
 19 procedures and deprives Mr. Okada of the opportunity to seek re-nomination and a full and fair
 20 vote at the 2014 Annual Meeting. FD Ex. A at 15; *see Shoen*, 885 F. Supp. at 1342 ("What [the
 21 defendant] ignores, however, is that while shareholders still can vote their shares freely, the range
 22 of choices available to them has been narrowed by the advancement of the meeting date and [the
 23 plaintiff]'s consequent inability to campaign."). Strikingly, even if the Removal Proposal fails to
 24 secure enough votes, the Executive Committee has authorized itself "to continue to seek to obtain
 25 a sufficient number of additional votes to approve the Removal Proposal." FD Ex. A at 14.
 26 These procedural sleights of hand undermine investors' expectation of accountability in the
 27 boardroom, and failure to enjoin the Special Meeting would send the wrong message regarding
 28 the appropriate means of presenting favored boardroom proposals to shareholders.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Mr. Okada's motion for preliminary injunction should be
3 GRANTED.

4
5 Dated: January 28, 2013

6 By /s/ Charles H. McCrea, Jr.

7 LIONEL SAWYER & COLLINS
8 SAMUEL S. LIONEL (SBN 1766)
9 CHARLES H. McCREA, JR. (SBN 104)
10 STEVEN C. ANDERSON (SBN 11901)

11 MORGAN, LEWIS & BOCKIUS LLP
12 MARC J. SONNENFELD*
13 JOSEPH E. FLOREN*
14 BENJAMIN P. SMITH*
15 CHRISTOPHER J. BANKS*

16 Attorneys for Plaintiff

17 KAZUO OKADA

18 *pro hac vice application forthcoming